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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. .....

HERBERT ECK, MARTIN M. KARLAN and COSIMO PERRUCCI,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit entered in the above-entitled cases April 1, 1953.

Opinions Below

The per curiam opinion of the Court of Appeals (R. 285) is reported at 202 F. 2d 750. The denial by that Court of the petition for rehearing (R. 299-300) is reported in —— F. 2d ——. The opinion in the Tax Court (R. 268) supporting its decision (R. 275) is reported in 16 T. C. 511. (See Note below.)

NOTE: Although the records upon the three petitioners' appeals below were separately printed, the appeals were argued and decided together. Insofar as the issues upon the present petition are concerned, the records are identical, varying only in the amounts involved. For the convenience of the Court, therefore, this is a consolidated petition and the references are to the record in the *Eck* case.

Jurisdiction

The jurisdiction of the Supreme Court to review this case rests upon 28 U. S. C. § 1254 (1).

Questions Presented

1. Under § 271 (a) of the Internal Revenue Code, can the Commissioner of Internal Revenue determine a deficiency if the taxpayer has filed amended returns and paid his correct income tax in full, with interest, previous to the Commissioner's attempted determination?

2. In the absence of any such statutory deficiency, can the Commissioner, under § 293 (b) of the Internal Revenue Code, impose a 50% addition to the taxpayer's original understatement of tax?

3. Under the Fifth Amendment to the U. S. Constitution, can § 293 (b) of the Internal Revenue Code be constitutionally applied so as to permit the imposition of the 50% addition to tax although the taxpayer has voluntarily made disclosure and paid his tax in full, with interest, long prior to any investigation by the government?

Statutes Involved

The statutes involved appear in the appendix to this petition at pages 15-16.

Statement of the Facts

For the purposes of this application (and of the appeal on the merits, if this petition be granted), it will be assumed that the petitioners' original income tax returns for

the years 1942, 1943 and 1944 fraudulently understated their income taxes for those years. (Petitioners were engaged in business as partners [R. 118]).

In 1945, however, the petitioners voluntarily filed amended returns for the three years in question, setting forth their actual tax due, and paid the tax, with interest, in full (R. 63). Those amended returns were admitted by the Commissioner to be entirely correct for 1942 and 1943, the tax for 1943 being actually overpaid, and the 1944 amended return was also admittedly correct except for some minor technical adjustments as to which the Commissioner has never made any claim of fraud (R. 64).

There was no Bureau of Internal Revenue investigation pending at the time the petitioners voluntarily filed their amended returns and paid their tax in full, with interest. In fact, no investigation was even commenced until ten months later (R. 64).

Although the investigation disclosed no additional taxes due (except for the minor adjustments for 1944), the Commissioner in 1949 determined that there had been fraud in the filing of the original returns and sent a notice of "deficiency" to the petitioners (R. 8). That notice of deficiency imposed a 50% addition to the understatement of tax in the original returns. It ignored the filing of the amended returns and the previous payment of the correct tax in full.[1]

---

[1] Because of this determination of fraud, the Commissioner also disallowed the forgiveness benefits of § 6 of the Current Tax Payment Act of 1943 with respect to the 1942 tax, although authorized to do so only if the 50% addition to tax is applicable to that year, which in turn is permissible only if there was a deficiency for that year—which there was not. This presents a special situation with respect to 1942 but the basic issue still remains as already set forth.

The so-called "deficiencies" thus determined were as follows (R. 269):

	Herbert Eck		Martin M. Karlan		Cosimo Perrucci	
	"Deficiency"	Fraud Addition	"Deficiency"	Fraud Addition	"Deficiency"	Fraud Addition
1942	$11,359.52	$5,679.76	$11,393.20	$5,696.60	$11,618.89	$5,809.45
1943		6,220.01		5,999.27		6,343.01
1944	1,172.47	7,363.29	1,059.70	7,144.32	1,148.90	7,484.20

The petitioners thereupon filed their petitions for review with the Tax Court of the United States (R. 4). The Tax Court upheld the Commissioner (R. 268).

Review was then sought in the United States Court of Appeals for the Second Circuit (R. 276). On April 1, 1953, that Court affirmed the Tax Court in a per curiam opinion (R. 285) and on April 27, 1953, denied a petition for rehearing (R. 300).

Specifications of Errors to be Urged

Since no deficiency existed under the definition of that term in § 271 (a), the Court of Appeals erred in permitting the Commissioner to determine a "deficiency" and to impose, under § 293 (b), a 50% addition to the non-existent deficiency in tax.

The Court of Appeals also erred in failing to hold that petitioners' rights under the Fifth Amendment to the U. S. Constitution were violated by the Commissioner's imposition of the 50% addition to tax despite petitioners' voluntary disclosure and payment of the tax in full, with interest, long prior to any government investigation.

Reasons for Granting the Writ

I

The decision of the Court of Appeals in this case, although in accord with a recent decision in the Fifth Circuit, has placed it in sharp conflict with decisions of the Third and Fourth Circuits with respect to the first issue here (the question as to the existence of any statutory "deficiency"). Its decision is also in direct conflict with the decisions of the present Court with respect to the second issue (the constitutional question) here presented.

The questions are most substantial and involve issues of far-reaching importance in federal law which should be settled by this Court.

II

The decision of the Court below rejects the plain mandate of an important federal statute.

§ 293 (b) of the Internal Revenue Code by its own terms comes into force only "if any part *of any deficiency* is due to fraud," in which event it authorizes the addition of 50% *of that deficiency*. If there is no deficiency, obviously there is nothing upon which § 293 (b) can operate. The question as to whether any deficiency in fact exists must be determined within the confines of the statutory definition of that term in § 271 (a) of the Code.

§ 271 (a) expressly requires the Commissioner, in determining whether any deficiency exists, to include two factors in his computation: the first (clause A of that section) consists of the difference between the tax legally due and the tax shown on the return, i.e., the amount of the understatement; the second (clause B) requires him to give credit for any "amounts previously collected" by him even without assessment.

The Commissioner in the present case, and the Court below, have given consideration only to the first of these two factors and have rejected the second. The statute does not permit of such selective application of its parts. Its words are clear:

> "Sec. 271. Definition of Deficiency.
>
> (a) In General—As used in this chapter in respect of a tax imposed by this chapter, 'deficiency' means the amount by which the tax imposed by this chapter exceeds the excess of—
>
> (1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, * * * plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—
>
> (2) the amount of rebates, as defined in subsection (b) (2), made." *

Petitioners earnestly submit that the decision below constitutes in effect a judicial revision of the clear language of § 271 (a) and § 293 (b).

The 50% addition to tax provided in § 293 (b) is *not* imposed for the *act of filing* a false return (which is covered by the criminal statute, § 145 [b]). The 50% addition can be imposed only if a *deficiency* exists as defined in § 271 (a).

Applying this statutory definition to the present case, we quickly find that here the sum of (A) the tax shown on the return and (B) the amount collected without assessment by the Commissioner previous to his asserted determination of any deficiency," was equal to (and in the case of 1943 actually exceeded) the tax legally due, so that at the time of his attempted "determination" in 1949 there was actually no deficiency in existence and consequently no deficiency of which 50% could be computed for the purposes of § 293 (b). 50% of nothing is nothing.

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* The statute quoted is the one applicable to 1943 and 1944, and is essentially the same as the earlier statute applicable to 1942 (see p. 15).

The U. S. Court of Appeals for the Fourth Circuit has recently upheld this construction of the statutory definition. In *McConkey* v. *Commissioner,* 199 F. 2d 892, 893 (C. A. 4, November, 1952), the Fourth Circuit's opinion was clear:

> "So far as this case is concerned, a 'deficiency' within the meaning of Section 271 (a) would be the excess of the correct tax due * * * over the amount shown on the return plus any amounts previously assessed or collected without assessment. Under the facts of this case, taxpayers had paid the $11,277.46 later found by the Commissioner to be due for 1947, and *when the Commissioner mailed his deficiency notice there was no excess over the amount shown on their return plus the amount previously collected without assessment. There was thus no 'deficiency'* * * *." (Italics ours.)

The Supreme Court of the United States refused to disturb this ruling when it denied certiorari, —— U. S. ——, 97 L. Ed. 669 (April 6, 1953).

It is interesting to note that in the *McConkey* case the Commissioner urged the very view which the Court there upheld but which he now opposes in the present case.

The Third Circuit is in accord with the Fourth Circuit's view that no "deficiency" exists under such circumstances.

In *Standard Portland Cement Co.* v. *Commissioner,* 80 F. 2d 585, 587 (C. C. A. 3, 1935), the Third Circuit held that the Board of Tax Appeals had improperly rejected evidence of such intervening payments previous to the attempted determination of a deficiency. The Court declared:

> "Again evidence of the payment on April 13, 1933 [of the tax due in 1926], was material and competent to show whether or not there was a deficiency on December 14, 1933, when the orders of redetermination [by the Board] were signed. True, payment of the amounts contained in the letters of deficiency was made without assessment, but § 271 (a) of the Revenue Act of 1928 * * *, defining a deficiency, indicates that a valid tax may be 'collected without assessment.' * * *

> This rejected evidence was material and necessary to enable the Board to determine whether or not there was a deficiency. By taking the payment into account, the Board might have found that there was no deficiency * * *."

Accord:

> *Anderson* v. *Commissioner*, 11 T. C. 841, 843 (1948); *Everett Knitting Works*, 1 B. T. A. 5, 6 (1924).

The legislative intent behind the statute is apparent from a reference to the legislative comments accompanying its enactment.

The original § 250 (b) of the Internal Revenue Act of 1918, c. 18, 40 Stat. 1057 (from which the present § 293 (b) eventually evolved), provided:

> "If the *understatement* is false or fraudulent with intent to evade tax, then * * * there shall be added as part of the tax 50 per centum of the amount of the *deficiency*."

In this original context in the Act of 1918 (which contained no definition of "deficiency"), it would appear that "deficiency" as there used might well have been synonymous with the taxpayer's original "understatement" alone. The subsequent history of the section reveals quite plainly the legislative intent to alter any such meaning of the term.

The 1918 Act was drastically revised by § 275 (b) of the Act of 1924, which very deliberately struck out the reference to "understatement" and substituted "deficiency," and then added § 273, which defined the term "deficiency" so as to require credit for any payments made subsequent to the understatement. See Revenue Act of 1924, c. 234, 43 Stat. 253, §§ 273 and 275 (b).

In S. Report No. 398 of the Finance Committee of the 68th Congress, 1st Session, p. 30, the Committee thus re-

ferred to the insertion of this statutory definition for the first time in the Revenue Act of 1924:

> "§ 273. The term 'deficiency' is here defined.
>
> Under the existing law (§ 250[b], second paragraph), the term 'deficiency' is not defined with exactness. Under the proposed provisions, *credits* and refunds *for each year will be considered in the determination of a deficiency* for that particular year." (Italics ours.)

The Commissioner, however, claims that this statutory definition is intended to apply only for the very limited purpose of determining the jurisdiction of the Tax Court as described in § 272.

The statute itself permits of no such limitation in its application. § 271 (a) expressly states that its definition applies to the term "deficiency" "as used in this chapter" (Chapter I, Income Tax)—and "this chapter" necessarily comprises all of its sections from § 1 to § 482, which include not only § 272 (the jurisdictional section) but also § 293 (b) (the tax fraud section).

The Commissioner, to be sure, in ignoring the plain requirement of § 271 that credit be given for payment in full of the tax as shown upon the amended return, has relied upon a practice of the Treasury Department which has been upheld from time to time by the Tax Court but which has never been approved by any other Court [2] (except very recently in the *Middleton* case, *infra*). But repetition of a practice, however long continued, cannot lend validity to that which is without warrant in law.

The exceedingly brief per curiam opinion of the Court of Appeals in the present case was confined to expressing

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[2] *Hirschman*, 12 T. C. 1223 (1949), appeal dismissed C. A. 2, 1/10/50; *Sherin*, 13 T. C. 221 (1949). Other instances have reached the appellate courts but have been decided on other grounds: *Samuels Estate*, 9 T. C. M. 196, aff'd. on other grounds 189 F. 2d 857 (C. A. 2, 1951); *Wisely*, 13 T. C. 253 (1949), rev'd. on other grounds 185 F. 2d 263 (C. A. 6, 1950).

reliance upon the recent decision of the Fifth Circuit in *Middleton* v. *Commissioner*, 200 F. 2d 94 (C. A. 5, November, 1952).

The learned Court in the *Middleton* case erred, we respectfully submit, in assuming that § 293 (b) imposes the 50% addition to tax upon some putative total of a *number of deficiencies*, so that one such deficiency could be found to exist in the mere understatement alone at the moment of filing the original return. But § 293 (b) expressly refers to the "total amount of *the deficiency*." The statute very carefully uses the singular, not the plural. There is only one deficiency.

§ 293 (b)—which authorizes the 50% addition generally—does break up that deficiency into two *parts:* the part attributable to fraud and the part not so attributable—and then imposes a tax upon the total of both *parts*, which together constitute the *single "deficiency."* And that single deficiency can be determined only pursuant to the definition of that term in § 271 (a).

The Court in the *Middleton* case considered the reference to a "deficiency" in clause B within the definition itself—namely, the reference to "amounts previously assessed (or collected without assessment) as a deficiency"—to be a source of confusion and to indicate an intention to regard the original understatement (described in clause A) as an "antecedent deficiency". There is no cause for confusion.

In *Everett Knitting Works, supra*, the Board of Tax Appeals gave the answer to any such approach:

> "Evidently [under the statute] *the amount previously collected must be subtracted from the amount of tax imposed by the statute in order to arrive at the statutory deficiency. The amount cannot at the same time be both the deficiency and also one of the factors in determining the deficiency.*" (Italics ours.)

§ 271 (a) does not contemplate any "antecedent deficiency." It *does* contemplate an antecedent *difference* between the tax due and the tax shown on the return, but this understatement is described in clause A and is not the same as the statutory "deficiency." It is only one of the factors to be considered. The other factor, in clause B, requires credit against this difference for any "amounts previously assessed (or collected without assessment)." It is only the *final result* of this computation that constitutes the statutory "deficiency," if any.

To be meaningful, of course, "previous" (in the phrase "amounts previously collected") must mean "previous to the Commissioner's determination in his notice of deficiency."

The definition itself, by its very use of the word "previous," clearly distinguishes between the original understatement and a statutory deficiency, for it thereby implies some lapse of time between the filing of the original understatement (which it describes in clause A) and the Commissioner's crediting of "previous" payments (which it describes in clause B). He can give such credit for "previous" payments only at a necessarily subsequent time—which is when he ultimately determines the deficiency, if any.

If the Commissioner, after so crediting previous payments, is left, as he is in the present case, without any deficiency for determination under § 271 (a), then there is no statutory deficiency in existence upon which § 293 (b) can operate.

"Deficiency" is a statutory term which must be construed strictly within the confines of its statutory definition. If the statute as presently worded does not permit the Commissioner to effect his purpose, his remedy is to request the Congress—not the Courts—to correct the statute. Meanwhile the tax laws are as binding upon the Commissioner as they are upon the taxpayers.

III

The decision below also erred in applying § 293 (b) unconstitutionally as to these petitioners by imposing the 50% addition to tax despite the fact that they had made voluntary disclosure and payment of the tax with interest, in full, long *prior* to any governmental investigation.

The decision below directly conflicts with the Fifth Amendment to the U. S. Constitution and with the holding of this Court in *Helvering* v. *Mitchell,* 303 U. S. 391, 401 (1938). The latter case expressly emphasized that § 293 (b) is *civil, compensatory and intended only "to reimburse the government for the heavy expense of investigation" and that it is not intended to be punitive.*[3]

It is essential to keep in mind that the 50% addition to tax under § 293 (b) is *not* imposed for the *act of filing* a false return.

The criminal offense of filing a false return consists of course of the act of filing and is complete *at the time of filing the return.*[4] Subsequent voluntary disclosure and payment therefore cannot defeat the *criminal* penalties for the completed offense.[5] But, as this Court very recently emphasized in *U. S.* v. *Real Estate Boards,* 339 U. S. 485, 493 (1950) (footnote 6), § 293 (b) operates on an entirely

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[3] The civil nature of this statute is also illustrated by the fact that this liability for the 50% addition to tax, unlike a criminal sanction, survives the taxpayer's death: *Kirk, Admin.* v. *Commissioner,* 179 F. 2d 619 (C. A. 1, 1950); *Reimer's Estate* v. *Commissioner,* 180 F. 2d 159 (C. A. 6, 1950), aff'g. 12 T. C. 913; *Nitto Estate,* 13 T. C. 858, 868 (1949); *Samuels Estate, supra.*

[4] *Guzik* v. *U. S.,* 54 F. 2d 618, 619 (C. C. A. 7, 1932), cert. den. 285 U. S. 545; *Cave* v. *U. S.,* 159 F. 2d 464, 467 (C. C. A. 8, 1947), cert. den. 331 U. S. 487; *Myres* v. *U. S.,* 174 F. 2d 329, 334 (C. C. A. 8, 1949); *U. S.* v. *Croessant,* 178 F. 2d 96, 98 (C. C. A. 3, 1949).

[5] *U. S.* v. *Sullivan,* 98 F. 2d 79 (C. C. A. 2, 1938); *U. S.* v. *Lustig,* 163 F. 2d 85 (C. C. A. 2, 1947), cert. den. 332 U. S. 775; *White* v. *U. S.,* 194 F. 2d 215 (C. C. A. 5, 1952), cert. den. 343 U. S. 930.

different basis. It is intended not to punish for past acts but only to compensate the government for investigatory expense (applied, for practical purposes, according to a general formula of 50% of the deficiency).[6]

The situation has been factually presented but never squarely met in a number of cases in the Tax Court. The latter has never distinguished those cases, such as the one here on review, in which voluntary disclosure and payment of the tax in full, with interest, are made *prior* to the inception of the government's investigation[7] and those in which such disclosure and payment are made *after* investigation has begun and expense incurred.[8]

Under this Court's rulings, the conclusion follows inevitably that if, as here, the taxpayer makes voluntary disclosure and payment of the tax in full, with interest, long *prior* to the initiation of any government investigation (and which investigation, when conducted, disclosed no deficiency), the government has not been subjected to any investigatory expense or loss for which it can or should be compensated.

Since this addition to tax cannot here be justified either as a penalty for past acts of the petitioners or as compensation for a loss and expense never sustained by the government, there remains no constitutional justification under these circumstances for the imposition of the 50% compensatory addition to tax.

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[6] Disclosure and payment made *after* government investigation has begun have been held not to prevent imposition of the civil 50% addition to tax, since it is actually compensating the government for the expense incurred by its having been forced to uncover the fraud and compel the payment. *Lashell's Estate*, 11 T. C. M. 274, 283 (1952); *Harmel*, 11 T. C. M. 599, 600 (1952); *Wagman*, 10 T. C. M. 836, 849 (1951).

[7] *Hirschman, supra; Wisely, supra; Sherin, supra.*

[8] *Lashell's Estate, supra; Harmel, supra; Wagman, supra; Samuels Estate; supra.*

The situation is not altered by the fact that, after the full tax and interest were paid, the government still chose to audit these petitioners' returns. Ordinary taxpayers whose returns are audited and found correct (as were these petitioners') are not charged with the expense of such investigations.

The imposition of the 50% addition to tax in this case is accordingly arbitrary, discriminatory and confiscatory, without warrant in fact or in law, and violates petitioners' rights under the due process clause of the Fifth Amendment to the U. S. Constitution.

CONCLUSION

This case involves substantial questions of federal law as to which the decisions of the Court of Appeals below and of the Fifth Circuit are in sharp conflict with the decisions of the United States Court of Appeals in the Third and Fourth Circuits.

The decision of the Court below is likewise in direct conflict with applicable decisions of this Court and has applied a federal statute in a manner prohibited by the Fifth Amendment to the U. S. Constitution.

We accordingly most respectfully pray that this petition be granted in order to settle these issues and to eliminate the widespread confusion and error which will result from the decision below.

Respectfully submitted,

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June 30, 1953.

APPENDIX

Statutes Involved

Internal Revenue Code, § 271 (a) (from Code of 1939, applicable to taxable year 1942) (26 U. S. C. § 271(a), 1940 ed.):

"SEC. 271. DEFINITION OF DEFICIENCY.

As used in this chapter, in respect of a tax imposed by this chapter, 'deficiency' means—

(a) The amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded or otherwise repaid in respect of such tax."

Internal Revenue Code, § 271(a) (as amended by § 14(a), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231, applicable to taxable years after 1942) (26 U. S. C. § 271(a), 1946 ed.):

"SEC. 271. DEFINITION OF DEFICIENCY.

(a) IN GENERAL—As used in this chapter in respect of a tax imposed by this chapter, 'deficiency' means the amount by which the tax imposed by this chapter exceeds the excess of—

(1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b) (2), made."

Internal Revenue Code, § 293(b) (26 U. S. C. § 293(b), 1946 ed.):

"SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY. * * *

(b) FRAUD.—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612 (d) (2)."

Current Tax Payment Act of 1943, c. 120, 57 Stat. 126:

"SEC. 6. RELIEF FROM DOUBLE PAYMENTS IN 1943.

(a) Tax for 1942 Not Greater Than Tax for 1943. * * * This subsection shall not apply in any case in which the taxpayer is convicted of any criminal offense with respect to the tax for the taxable year 1942 or in which additions to the tax for such taxable year are applicable by reason of fraud.

(b) Tax for 1942 Greater Than Tax for 1943. * * * This subsection shall not apply in any case in which the taxpayer is convicted of any criminal offense with respect to the tax for the taxable year 1942 or in which additions to the tax for such taxable year are applicable by reason of fraud. * * *"

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OCTOBER TERM, 1953

No. 162

HERBERT ECK, PETITIONER

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MARTIN M. KARLAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

COSIMO PERRUCCI, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 268-274) [1] is reported in 16 T.C. 511. The *per curiam* opinion of

[1] Since the records, printed separately in each of these three cases, are identical except for names, numbers, tax returns and

the Court of Appeals (R. 285) is reported in 202 F. 2d 750.

JURISDICTION

The judgments of the Court of Appeals in all three cases were entered on April 1, 1953. (R. 286-288.) The taxpayers' joint petition for rehearing was denied on April 27, 1953. (R. 299-300.) The petition for a writ of certiorari was filed on July 3, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Commissioner may assess a 50 per cent fraud penalty under Section 293(b) of the Internal Revenue Code where the taxpayers, having filed fraudulent original returns, prior to the assessment of the penalty file out-of-time amended returns together with the amounts of the taxes actually due.

STATUTE AND REGULATION INVOLVED

The pertinent statute and regulation are printed in the Appendix, *infra,* pp. 13-18).

STATEMENT

The facts, as found by the Tax Court (R. 269-270), may be summarized as follows:

The taxpayers were equal partners in the Rae Metal Products Company, a partnership organized

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the decisions entered by the Tax Court, the record citations herein, for brevity, refer only to the printed record in *Eck* v. *Commissioner*. All three cases were consolidated in the Tax Court (R. 2, 27, 268-274) and in the Court of Appeals (R. 285-300; Pet. 1).

on April 1, 1942, for the purpose of manufacturing metal stampings. (R. 269.) Original partnership returns for the calendar years involved (1942, 1943 and 1944) were timely filed with the local Collector of Internal Revenue. Taxpayer Eck and his wife timely filed joint income tax returns and taxpayers Karlan and Perrucci filed their respective individual income tax returns for those years with the same collector. All of those returns contain deliberate understatements of income in substantial amounts. (R. 269-270.) [2]

The taxpayers' partnership filed amended returns on August 29, 1945, for the three taxable years involved, reporting taxable net income in a much larger amount for each year than had been reported on the original returns. On August 29, 1945, taxpayers Karlan and Perrucci each filed amended returns and on the following day taxpayer Eck and his wife filed joint amended returns for all the taxable years involved, all reporting net income in a much larger amount for each year than had been reported on their original returns. The additional taxes shown to be due on all the amended returns were paid. (R. 270.)

Upon the basis of these facts, the Tax Court, sustaining the Commissioner's determinations in all three cases (R. 8-16), held (a) that the fraud penalties asserted by the Commissioner against the

[2] Inasmuch as taxpayers concede (Pet. 2-3), for the purposes of this petition, that their original income tax returns fraudulently understated their income for the taxable years, the underlying facts on this issue will not be set forth here, but may be found in the findings and opinion of the Tax Court. (R. 268-274.)

taxpayers, based on the fact that their original returns grossly understated their taxable income, were proper even though they voluntarily reported and paid most of their additional taxes due upon filing, after the taxable years, amended returns for all taxable years involved; (b) that since the taxpayers were guilty of fraud, the relief provisions of the Current Tax Payment Act of 1943 were not allowable for the year 1942; and (c) that it had jurisdiction here where the Commissioner's statutory notices gave the taxpayers notice of determination of deficiencies, not in taxes but merely in fraud penalties for the year 1943 (R. 271-274). The Court of Appeals for the Second Circuit unanimously affirmed *per curiam* on the opinion of the Tax Court (R. 285).

ARGUMENT

The decision of the court below, affirming the Tax Court in its application of a well-settled construction of Sections 271(a) and 293(b) of the Internal Revenue Code, is clearly correct, and presents neither a conflict of decisions nor any question warranting review by this Court.

1. The Tax Court and the Treasury have long rejected taxpayers' principal contention (Pet. 4-11) that, inasmuch as their out-of-time amended returns had allegedly eliminated any deficiency within the meaning of Section 271(a) (Appendix, *infra,* pp. 13-14), there was no basis for the subsequent assessment by the Commissioner of the 50% fraud addition under Section 293(b) (Appendix,

infra, pp. 16-17). *Sherin* v. *Commissioner*, 13 T. C. 221; *Hirschman* v. *Commissioner*, 12 T.C. 1223, appeal dismissed, January 10, 1950 (C.A. 2); *Wilson* v. *Commissioner*, 7 T.C. 395; *McLaughlin* v. *Commissioner*, 29 B.T.A. 247; *McDonnell* v. *Commissioner*, 6 B.T.A. 685; *Gutterman Strauss Co.* v. *Commissioner*, 1 B.T.A. 243, 246-249; Treasury Regulations 111, §29.271-1 (Appendix, *infra*, pp. 17-18); Mim. 3428, V-1 Cum. Bull. 119 (1926). As taxpayers concede (Pet. 9-10), this precise contention was considered and rejected by the only other court of appeals which has treated the issue. *Middleton* v. *Commissioner*, 200 F. 2d 94 (C.A. 5).

The contention rests upon a literal argument, as follows: a "deficiency" is defined by Section 271(a) as the amount by which the actual tax exceeds the amount of the tax reported plus the "amounts previously assessed (or collected without assessment) as a deficiency" over the amount of rebates. Section 293(b), under which the 50% fraud addition is assessed, is phrased in terms of "deficiency," *i.e.*, "If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be assessed * * *" Accordingly, taxpayers argue, inasmuch as the amount of the "deficiency" created by their original, concededly fraudulent, returns was wiped out by their later amended returns, there was no deficiency upon which a Section 293(b) fraud addition could have been assessed.

This contention is without merit. In the first place, there is no provision in the Internal Revenue

Code for the filing of amended returns out of time or otherwise, and the acceptance or rejection of the amended returns after the expiration of the statutory due date for filing the original returns, is a matter solely within the discretion of the Commissioner which is not reviewable by the courts. *Keeler* v. *Commissioner,* 180 F. 2d 707, 710 (C.A. 10); cf. *Riley Co.* v. *Commissioner,* 311 U.S. 55. Here, the record does not show nor have the taxpayers established that the Commissioner ever accepted their amended returns in lieu of the original returns or otherwise. Obviously, the non-acceptance of such returns by the Commissioner—except collaterally for the additional information therein, not furnished in the original returns—was entirely proper. If this were not within his power, all that a taxpayer, trapped or about to be trapped in a tax-fraud dilemma, would need do in order to escape the sanctions imposed by Congress for fraud under §293(b) would be to file amended returns correcting the evil. The taxpayer would thereby defeat all fraud payments imposed by the revenue statutes, whether or not trapped by the taxing authorities. Cf. *Hoefle* v. *Commissioner,* 114 F. 2d 713 (C.A. 6); *Wickham* v. *Commissioner,* 65 F. 2d 527, 531 (C.A. 8). Such a result is manifestly not contemplated by the statute.

Further, the legislative history of the Sections demonstrates that the "deficiency" defined in Section 271(a) is not determinative of the amount which can be assessed under Section 293(b). The first definition of "deficiency" appeared in Section

273 of the Revenue Act of 1924, c. 234, 43 Stat. 253, and was continued in the same language in subsequent Revenue Acts to and including the Internal Revenue Code,[3] until amended to its present form by Section 14 of the Individual Income Tax Act of 1944, c. 210, 58 Stat. 231. The 1924 Act definition was enacted in connection with Section 274 of that Act (present Section 272(a) of the Code (Appendix, *infra*, pp. 15-16), which provided for the jurisdiction of the Board of Tax Appeals in notice-of-deficiency cases. Reading both sections in *pari materia* shows that the statutory term "deficiency" was defined in the earlier Acts and in Section 271 (a) of the present Code for the purpose of prescribing the Tax Court's jurisdiction and fixing the limits beyond which the Commissioner could not go in collecting taxes and the statutory additions thereto without affording taxpayers the right to appeal to the Tax Court for redetermination of such liability before payment.[4]

On the other hand, the substance of Section 293(b) of the Internal Revenue Code, providing for 50% additions to and as part of the tax in cases of fraud, was first included in Section 250(b) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, which

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[3] This Section was numbered and continued as Section 271 in the Revenue Act of 1928, c. 852, 45 Stat. 791.

[4] See H. Rep. No. 179, 68th Cong., 1st Sess., pp. 7-8, 24-25 (1939-1 Cum. Bull. (Part 2) 241, 246-247, 258-259); S. Rep. No. 398, 68th Cong., 1st Sess., pp. 8-9, 30-31) (1939-1 Cum. Bull. (Part 2) 266, 271-272, 287; H. Rep. No. 1, 69th Cong., 1st Sess., pp. 10-11 (1939-1 Cum. Bull. (Part 2) 315, 321-322); S. Rep. No. 52, 69th Cong., 1st Sess., pp. 25-28 (1939-1 Cum. Bull. (Part 2) 332, 351-353); S. Rep. No. 885, 78th Cong., 2d Sess., pp. 37-41 (1944 Cum. Bull. 858, 887-889).

related to the collection of taxes. That section provided (1) that if the Commissioner's examination of "the [original] return" [5] disclosed that the tax paid thereon was less than the amount which should have been paid by the taxpayer, the difference, less any non-barred credits due the taxpayer under Section 252 of that Act, should be paid to the Collector upon notice and demand; (2) that while a *bona fide* non-negligent understatement in the return should not be penalized, nevertheless such an understatement which was due to neglect but without intent to defraud should be penalized at the rate of 5% "of the total amount of the deficiency" to "be added as part of the tax"; and (3) that "If the understatement is false or fraudulent with intent to evade the tax, then * * * there shall be added as part of the tax 50 per centum of the amount of the deficiency."

Although there was no statutory definition of the term "deficiency" in Section 250(b) of the 1918 Act, the language of that section and the Statement of the Managers of the House in connection with the Conference Report [6] clearly indicate that Congress intended the 50% penalty to apply to any fraudulent understatement of income shown on the taxpayer's original return. The same provision for such penalties was continued in Section 250(b) of the Revenue Act of 1921, c. 136, 42 Stat. 227, with some slight immaterial changes in language except

[5] As pointed out, there is no provision in the taxing statutes for amended returns.

[6] H. Conference Rep. No. 1037, 65th Cong., 3d Sess., pp. 43, 61 (1939-1 Cum. Bull. (Part 2) 130, 144).

that the second paragraph thereof—dealing with penalties—defined, for the first time, a "deficiency" as the difference between the amount of tax already paid on the original return and that which should have been paid thereon, less any credits due the taxpayer under Section 252 of that Act. It further provided that "If any part of the deficiency is due to fraud with intent to evade tax, then * * * there shall be added as part of the tax 50 per centum of the total amount of the deficiency in the tax." This new statutory definition of a "deficiency" indicates that the penalties imposed therein were to be based on the understatement of income made in the taxpayer's original return. The provision corresponding directly to Section 293(b) of the Internal Revenue Code was enacted in Section 275(b) of the Revenue Act of 1924, the principal change being that if "any part of any deficiency" is due to fraud with intent to evade tax then the penalty of 50% "of the total amount of the deficiency (in addition to such deficiency)" shall be "so" assessed, collected and paid "in the same manner as if it were a deficiency," as provided in respect of the negligence penalty imposed by Sections 275(a) of the 1924 Act and 293(a) of the Code.[7]

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[7] By making the penalty imposed by Section 293(b) "so assessed, collected, and paid," Congress has, as the Tax Court held in the present and other cases (R. 273-274), provided for the redetermination by the Tax Court of fraud penalties asserted by the Commissioner, as here, before they can be collected from the taxpayer. See also *Gutterman Strauss Co.* v. *Commissioner*, 1 B.T.A. 243, 246-249.

This language of Section 293(a) and (b) disposes of any suggestion that the notice of assessment for 1943 in this case was defective in that it did not state a deficiency in tax (see

Inasmuch as the present provisions of the Internal Revenue Code and the corresponding provisions of the prior Revenue Acts have been reenacted many times by Congress, the Commissioner's interpretation and application thereof, in the light of the legislative history and the many decisions of the Board of Tax Appeals and the Tax Court, must be deemed to have received legislative approval. *Hecht* v. *Malley,* 265 U. S. 144; *National Lead Co.* v. *United States,* 252 U. S. 140.

Finally, as the Court of Appeals for the Fifth Circuit held in the *Middleton* case, this legislative history and administrative and judicial interpretation of the sections is completely consistent with their language. Section 293(b) provides a penalty or "additions to the tax" computed, not upon "any part of any deficiency," but upon "the total amount of the deficiency," which is the sum total of the deficiency referred to in clause (B) and that otherwise defined by Section 271(a). This "total" deficiency is the difference between the amount of the true liability as finally ascertained and the amount disclosed on the original return, and is not limited to the "deficiency" contemplated by Section 271(a).

2. Taxpayers' constitutional contention (Pet. 4, 12-14) is manifestly without substance. The argument seems to run that inasmuch as no investigation had preceded their filing of an amended return,

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R. 269), for the section provides merely that the fraud penalty is to be "so" assessed, *i.e.*, in the same manner as a deficiency, and does not require that a deficiency be assessed at the same time.

the basis for the fraud payment had disappeared. Cf. *Helvering* v. *Mitchell,* 303 U. S. 391, 401. The short answer to this argument of course is that the filing of the amended returns in no way obviated the necessity for the Commissioner's making a complete investigation of the partnership's falsified books and records and of its and the taxpayers' false original returns for all years (R. 62-79). The Commissioner was put on notice by the amended returns of taxpayers' continuing tax frauds throughout a period of at least three years. It was accordingly necessary to incur heavy investigative expense to safeguard and protect the Government from the loss of revenue resulting from the taxpayers' continuous tax evasion schemes.

3. There is no conflict of decisions. (Cf. Pet. 7-8). Both *McConkey* v. *Commissioner,* 199 F. 2d 892 (C.A. 4), certiorari denied, 345 U.S. 924, and *Standard Portland Cement Co.* v. *Commissioner,* 80 F. 2d 585 (C.A. 3), dealt only with the jurisdiction of the Tax Court to review tax deficiencies asserted by the Commissioner under Section 271 (a). Neither involved a deficiency asserted by the Commissioner, as here, by reason of fraud under Section 293(b).

CONCLUSION

The decision of the court below is clearly correct and presents no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST, 1953.

APPENDIX

Internal Revenue Code:

SEC. 271.[8] DEFINITION OF DEFICIENCY.

As used in this chapter in respect of a tax imposed by this chapter "deficiency" means—

(a) The amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

(b) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.

(26 U.S.C. 1940 ed., Sec. 271.)

SEC. 271[9] [As amended by Sec. 14(a), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231] DEFINITION OF DEFICIENCY.

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[8] Section 271(a) and (b) in this form applies only to the taxable year 1942 involved herein.

[9] Section 271(a) and (b) as thus amended applies to the taxable years 1943 and 1944 involved herein.

(a) *In General.*—As used in this chapter in respect of a tax imposed by this chapter, "deficiency" means the amount by which the tax imposed by this chapter exceeds the excess of—

(1) the sum of (A) the amount, shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b)(2), made.

(b) *Rules for Application of Subsection (a).*—For the purposes of this section—

(1) the sum of (A) the amount shown as the tax shown on the return shall both be determined without regard to payments on account of estimated tax, without regard to the credit under section 35, and without regard to so much of the credit under section 32 as exceeds 2 per centum of the interest on obligations described in section 143(a);

(2) The term "rebate" means so much of an abatement, credit, refund, or other repayment, as was made on the ground that the tax imposed by this chapter was less than the excess of the amount specified in subsection (a)(1) over the amount of rebates previously made; and

(3) The computation by the collector, pursuant to section 51(f), of the tax imposed by this chapter shall be considered as having

been made by the taxpayer and the tax so computed considered as shown by the taxpayer upon his return.

(26 U.S.C. 1946 ed., Sec. 271.)

SEC. 272 [As amended by Sec. 168(a), Revenue Act of 1942, 56 Stat. 798, and Sec. 203 (a), Act of December 29, 1945, c. 652, 59 Stat. 669, 673]. PROCEDURE IN GENERAL.

(a)(1) *Petition to the Tax Court of the United States.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653 (a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

In the case of a joint return filed by husband and wife such notice of deficiency may be a single joint notice, except that if the Commissioner has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, duplicate originals of the joint notice must be sent by registered mail to each spouse at his last known address. If the notice is addressed to a person outside the States of the Union and the District of Columbia, the period specified in this paragraph shall be one hundred and fifty days in lieu of ninety days.

* * * * *

(26 U.S.C. 1946 ed., Sec. 272.)

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

(a) *Negligence.*—If any part of any deficiency is due to negligence, or intentional disregard of rules and regulations but without intent to defraud, 5 per centum of the total amount of the deficiency (in addition to such deficiency) shall be assessed, collected, and paid in the same manner as if it were a deficiency, except that the provisions of section 272(i), relating to the prorating of a deficiency, and of section 292, relating to interest on deficiencies, shall not be applicable.

(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the

50 per centum addition to the tax provided in section 3612(d)(2).

(26 U.S.C. 1946 ed., Sec. 293.)

Treasury Regulations 111:

SEC. 29.271-1. DEFICIENCY DEFINED.—Section 271 by its definition of the word "deficiency" provides a term which will apply to any amount of tax determined to be due in respect of a taxable year in excess of the amount of tax reported by the taxpayer for such year; or in excess of the amount reported by the taxpayer as adjusted by way of prior assessments, abatements, credits, refunds, or collections without assessment. In defining the term "deficiency" section 271 recognizes two classes of cases—one, where the taxpayer makes a return showing some tax liability; the other, where the taxpayer makes a return showing no tax liability, or where the taxpayer fails to make a return. Additional tax shown on an "amended return," so called, is a deficiency within the meaning of the Internal Revenue Code.

When a case is considered for the first time, the deficiency is the excess of the amount determined to be the correct amount of the tax over the amount shown as the tax by the taxpayer on his return, or, if it is a case where no tax was reported by the taxpayer, the deficiency is the amount determined to be the correct amount of the tax. Subsequent information sometimes discloses that the amount previously determined to be the correct amount of the tax is less than the correct amount, and that a redetermination of the tax is necessary. In such a case the deficiency on redetermination is

the excess of the amount determined to be the correct amount of the tax over the sum of the amount of tax reported by the taxpayer and the deficiency assessed in connection with the previous determination. If it is a case where no tax was reported by the taxpayer, the deficiency is the excess of the amount determined to be the correct amount of the tax over the amount of the deficiency disclosed by the previous determination. If the previous determination resulted in a credit or refund to the taxpayer, the deficiency upon the second determination is the excess of the amount determined to be the correct amount of the tax over the amount of tax reported by the taxpayer decreased by the amount of the credit or refund.

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IN THE

Supreme Court of the United States

October Term, 1953

No. 162

HERBERT ECK, MARTIN M. KARLAN and COSIMO PERRUCCI,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' REPLY BRIEF

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IN THE

Supreme Court of the United States

October Term, 1953

HERBERT ECK, MARTIN M. KARLAN and COSIMO PERRUCCI, Petitioners, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	No. 162

PETITIONERS' REPLY BRIEF

I

Respondent's opposing brief (pp. 5-6) first contends that there is no provision in the Internal Revenue Code for the filing of amended returns and that consequently the *filing of those amended returns* can be of no avail to petitioners. No such issue is involved here.

The position of the petitioners is that *the payment and collection of the tax in full* in 1945—which is not disputed—precluded the Commissioner's subsequent determination in 1949 of any statutory deficiency. Under the express definition of "deficiency" in § 271(a) and particularly Clause B of that section, the fact that the full tax had been "previously collected" by the Commissioner precluded his determination that a deficiency existed.

The Commissioner in this case has sought to convert the original *understatement* of tax into an ultimate statutory *deficiency* by ignoring the plain requirements of the definition of that term in § 271(a) when he refused to first give credit for the amount "previously collected." This he was not empowered to do.

See *McConkey* v. *Commissioner; Standard Portland Cement Company* v. *Commissioner; Anderson* v. *Commissioner;* and *Everett Knitting Works;* all discussed in our petition, pp. 7, 8 and 10.*

II

Respondent contends, but without specification, that the legislative history supports his various interpretations of the statutes involved. The contrary is actually the case.

For example, nothing appears anywhere in the statutes or in the accompanying legislative comments that would indicate any legislative intention (such as respondent ascribes to Congress) to limit the application of the statutory definition of "deficiency" in § 271(a) only to the jurisdiction of the Tax Court.

Unlike our petition, with its direct quotation from the Congressional comment accompanying the enactment of the statute, respondent's brief is unable to quote a single legislative comment to support his interpretation. He simply refers (p. 7) to a mass of Congressional reports which, on careful reading, fail completely to reveal a single word lending any foundation whatsoever to his view.

Respondent's further references (pp. 8-9) to the history of § 293(b) is a curious admixture of his own interpretive language with the actual phraseology of the statutes in question. The result is of course a completely erroneous picture.

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* The additional innuendo in respondent's brief (p. 6) that these taxpayers were "trapped or about to be trapped in a tax-fraud dilemma" which motivated their filing of amended returns and their payment of the tax, is thoroughly unwarranted. As pointed out in the petition (p. 3)—and in no way disputed by respondent—there was no Bureau of Internal Revenue investigation pending at the time the petitioners voluntarily filed those amended returns and paid their tax in full, with interest, and, in fact, no investigation was even commenced until almost a year later.

Thus, after referring to § 250(b) of the 1918 Act as indicating a Congressional intention to apply the 50% addition to tax to the "understatement" shown on the taxpayers' original returns, respondent's brief asserts that "the same provision * * * was continued" in the Act of 1921 "with some slight immaterial changes." The latter characterization must be viewed with something more than skepticism when we find that the Act of 1921, c. 136, 42 Stat. 227, actually and completely dropped the term "understatement". Surely this is anything but "immaterial."

When the respondent goes on to say (p. 9) that the second paragraph of the new § 250(b) of the 1921 Act for the first time defined a "deficiency" as "the difference between the amount of tax already paid on the original return and that which should have been paid thereon," he is indulgently adding his own words to the statute's. The 1921 statute said nothing about the difference between the tax paid "on the original return" and that which should have been paid. The words "on the original return" are gratuitous on respondent's part. The statute itself obviously intended quite the opposite result, for it provided that:

> "As soon as practicable after the return is filed, the Commissioner shall examine it * * *.
>
> "If the amount already paid is less than that which should have been paid, the difference to the extent not covered by any credits due to the taxpayer under § 252 (hereinafter called 'deficiency'), * * * shall be paid * * *."

The statutory language was thus referring to and requiring credit for any amounts "already paid" *at the time of the Commissioner's examination of the return*, which would necessarily include all amounts paid *up to that time*. It would naturally include payment of the understated amount of tax.

Respondent omits mention of the fact that the same 1921 statute (§ 250[f]) went on to provide:

> "In the case of any deficiency (except where the deficiency is due to negligence or to fraud with intent to evade tax), where it is shown to the satisfaction of the Commissioner that the payment of such deficiency would result in undue hardship to the taxpayer, the Commisioner may * * * extend the time for the payment of such deficiency or any part thereof * * *."

The statutory language thus very clearly conceived of a "deficiency" as something that was *still to be paid* by the taxpayer *at the time of the Commissioner's determination,* since the Commissioner could not possibly "extend the time for payment" of something already paid. The Congress had thus clearly moved on beyond the concept of a "deficiency" consisting of nothing more than the understatement on the original return. It was now thinking—and enacting law—on the basis of what, if anything, was owed by the taxpayer *at the time of the Commissioner's examination and determination.*

If there was any room for doubt as to this being the correct view of the Congressional intent in the 1921 Act, that doubt was quickly dissipated with the enactment of the Act of 1924. The latter eliminated all the previous possible ambiguities in language and (as described in our petition, pp. 8-9) for the first time clearly defined the term "deficiency" so as to require in its computation that *credit first be given for any payments made subsequent to the original understatement and previous to the Commissioner's determination.* Revenue Act of 1924, c. 234, 43 Stat. 253, §§ 273 and 275(b). The report of the Senate Finance Committee (quoted in our petition, pp. 8-9) confirms that intention. And the statute *expressly* made that definition applicable to the *entire* Revenue Act, with nothing in any way limiting its application only to the section prescribing the jurisdiction of the Tax Court.

Respondent, however, contends that his contrary interpretation of the Revenue Acts "must be deemed to have received legislative approval" because those acts "had been

re-enacted many times by Congress" and his application of those acts had been upheld in the Tax Court. His contention rests upon several erroneous assumptions.

In the first place, the pertinent provisions of those Revenue Acts have *not* been "re-enacted many times" by Congress. The history of the sections in question from the Act of 1918 through the Acts of 1921, 1924 and 1940, with their innumerable drastic revisions and amendments, with whole paragraphs being dropped and entirely new sections being added from time to time—all this can scarcely be described as "re-enacted many times." The history of the statute thus in fact fails to meet a basic test laid down in one of the very cases cited by respondent (brief, p. 10), *National Lead Co.* v. *United States,* 252 U. S. 140, 146, where the Supreme Court of the United States itself answered his present argument:

> "The re-enacting of the * * * [statutory] provision four times, *without substantial change,* * * * amounts to implied legislative recognition and approval of the executive construction of the statute." (Italics ours.)

In the second place, the legislative comments accompanying the enactment of these various amendments (and which have already been adverted to) clearly indicate a Congressional intention precisely contrary to respondent's view.

Finally, the principle governing the effect of judicial decisions on legislative history and very properly recognized in both the *Hecht* and the *National Lead Co.* cases cited by respondent (brief, p. 10) leads, under the instant circumstances, to a result exactly opposite to the one urged by respondent. For the judicial decisions have been nothing like that described by him.

Thus, one of the very earliest Board of Tax Appeals cases, decided in 1924 (*Everett Knitting Works,* 1 B. T. A. 5, 6, quoted in our petition, p. 10), expressly held that "the amount previously collected * * * cannot at the same time be both a deficiency and also one of the factors in determin-

ing the deficiency." And, in the only instance during all those years where the issue of the definition of a statutory "deficiency" was ever presented to any court of law, the latter unhesitatingly adopted the precise view here submitted by the present petitioners and at the same time rejected the interpretation now urged by respondent. *Standard Portland Cement Co.* v. *Commissioner,* 80 F. 2d 585, 587 (C. C. A. 3, 1935) (quoted in our petition, p. 7).

It was not until November, 1952, in the very recent Fifth Circuit *Middleton* case, that a federal court of law for the first time departed from the 17-year-old view of the Third Circuit in the *Standard Portland Cement Co.* case, *supra,* and accepted instead the contrary view of a few Tax Court decisions which were handed down only in much later years. (See cases cited in our petition, p. 9, footnote 2.)

Almost simultaneously with the Fifth Circuit's *Middleton* case, however, and contrary to it, the Fourth Circuit chose to adhere to the Third Circuit's *Standard Portland Cement Co.* view and the Supreme Court subsequently refused to disturb that ruling. *McConkey* v. *Commissioner,* 199 F. 2d 892, 893 (C. A. 4, November, 1952), certiorari denied 345 U. S. 924, 97 L. Ed. 669 (April 6, 1953) (see our petition, p. 7).

The judicial history is therefore precisely contrary to the one suggested by respondent. The actual history shows that the early Board of Tax Appeals and United States Circuit Court of Appeals decisions adopted the present petitioners' view during the years of the enactment of the statutes in question and that it was not until very much later that the Tax Court altered its interpretation of the statute and not until 1952 that the Fifth Circuit did likewise. The judicial view prevailing during the critical legislative years was thus identical with the one here submitted by the present petitioners.

III

In answer to petitioners' constitutional contention (as to the fatal lack of any requisite compensatory basis for the imposition of the 50% addition to tax), respondent simply asserts (p. 11) that the filing of the amended returns and the payment of the tax in full "in no way obviated the necessity for the Commissioner's making a complete investigation" and that it was necessary for him "to incur heavy investigative expense to safeguard and protect the Government from the loss of revenue." The claim is without merit.

There was no more necessity here for the respondent to investigate these petitioners' amended returns than there is in the case of any other ordinary taxpayers whose returns are audited and found correct (as were these petitioners'). The investigation could not have been necessary "to safeguard the Government from loss" because these petitioners had already paid their tax in full, with interest, and the investigation admittedly showed no further tax due and no loss thereby prevented.

If, after the full tax and interest had been paid by these petitioners, respondent still chose to audit their returns, they can no more constitutionally be charged with the expense of that investigation than can any other ordinary taxpayers whose returns are similarly audited and found correct.

The requisite constitutional basis for imposing the compensatory addition to tax is therefore utterly lacking under the facts in this case.

IV

We accordingly most respectfully reiterate our prayer that this petition be granted.

Respectfully submitted,

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